Supreme Court, U.S.
FILED
JUN 13 1994
OFFICE OF THE CLERK

(1)

No. 94-74

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BRIAN R. GARDELL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRIAN R. GARDELL
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QUESTIONS PRESENTED FOR REVIEW

1. Can the direct wages and compensations for labor (an individual's Life's time traded for money in an act of resiprosity) be considered as income under the original meaning of the word (income) as used and excepted by the people in the terms and conditions set forth by the 16th amendment?

2. If the answer to question #1 is no; would it be unlawful under that instrument (16th) to compel taxes on wages (as described above) by any means?

3. Since it is an undeniable fact that since 1942 the U.S. government has promoted a program of taxation upon the wages (as described above) of it's citizenry; if the answer to question #2 is yes; does this not constitute fraud?

4. If fraud is present in the taxation scheme, would the prevailing collection system which abrogates Common Law due process and a jury trial be Constitutional if the citizen being put upon demanded those rights;

and would it not be the duty of the Courts to demand proof of jurisdiction from the plaintiff if the defendant so demands?

5. If the answer to question #1 is yes; does this not infringe upon protected Constitutional rights which preserve Life, Liberty and the Pursuit of Happiness?

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OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the First Circuit, case No. 93-1916, entered May, 6 1994 is included in its entirety in the attached Appendix, hereto referred to as "A".

The Opinion and Judgment of the United States District Court in the District of New Hampshire, case No. 93-mc-12-L, entered July 19,1993 is likewise included in the attached Appendix hereto referred to as "B".

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the First Circuit was entered on May 6, 1994. This Petition for Writ of Certiorari was filed within ninety (90) of said Order and Judgment pursuant to Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

The Order and Judgment of the United States District Court in the District of New Hampshire entered July 19, 1993, was a final order appealable of right pursuant to 28 U.S.C. §1291, Reisman v. Caplin 375 U.S. 440, 449 (1964) and was initiated in accordance with Rule 4(a), F.R.A.P.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States

Amendments:

Artical XVI (16)
The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Article VII (7)
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,...

Article I (1)
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;....

Article IV (4)

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.....

Article V (5)

....nor be deprived of life, liberty, or property, without due process of law;.....

Article XIII (13)

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, of any place subject top their jurisdiction.

Statutes:

Title 26 §7602(a)
Examination of books and witnesses

(a) Authority to summon, etc. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized-

1. To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

2. To summon the person liable for tax or required to perform the act, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to

perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

3. To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE

The Petitioner (Gardell) in this case has been assessed by the Internal Revenue Service (IRS) for a tax debt which they say is owing for the years 1985 and 1987. Because Gardell did not voluntarily comply with the summons (issued to gain information which would allow the IRS to collect this debt), a suit was initiated under Title 26 §7602 to compel compliance.

Gardell, taking the position that he had no taxable income for the years in question and had filed no forms to that respect, forthwith challenged both subject-matter and personal jurisdiction, specifically demanding proof be offered to show that he

had, one, voluntarily waived his rights to Constitutional Common Law due process and a jury trial or, two, had had the taxable income which would have bound him to this civil action. The District Court's response to said challenge (now affirmed by the First Circuit) was to deny that proof be offered, reasoning that "the usual procedure for the recovery of debts is reversed in the field of taxation."[1]

Because it has been held by the Court's that taxation, being the "life-blood of government,"[2] is to be of a civil nature (in contradistinction to the Common Law) and that due process is satisfied with an administrative hearing (tax court); a system has evolved which eliminates costly common law process for the expeditious collection of justifiable tax debt. This change in Constitutional due process is predicated upon the premise that the tax being collected

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1. Bull v. United States, 295 U.S. p.260.
2. Bull v. United States, 295 U.S. p.259.

is consistent with the Law; which in this country has its foundation in the Constitution, who's philosophy is based upon the rights of the individual to live free.

If the tax being collected is found to be flawed in any way, this potentially dangerous system of collection (which allows for the taking of property without a jury trial; 7th Amendment) must be abandoned for the safety of Constitutionally protected Common Law due process.[3]

This becomes the point of contention in this case, because the righteousness of the Income Tax (as sanctioned by the 16 Amendment) has been vitiated by the expanded meaning of the term Income. It is now generally excepted by the public (being promoted by the hand of government) that Income is an all inclusive term which

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3. "But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign". Bull v. US supra p.260

now involves the compensations that persons trade for their Life's time (property), generally known as wages.

This Court has defined the word income in other cases specifically leaving out compensatory exchanges between contracting parties.[4] Income as excepted by the people at the time of the ratification of the 16th Amendment did not include reciprocity, income simply comes in (as profits and gains). In fact the misuse of this term and the subsequent tax which it seems to invoke did not appear until the mid 40's, the imposition of which came under a two year war tax dubbed the "Victory Tax". This tax (being within the parameters of Article 1 Sect. 8, USC) was repealed after two years but the money's form it never stopped being collected. This new scheme in the tax system (taxing wages as income) as innocuous as its architects

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4. Eisner v. Macomber 252 US 189 p.207, and Merchants' L.& T. Co. v. Smietanka, 255 U.S.509 p.519

may have believed it to be, is in fact inconsistent with logic, freedom and the Law, when compelled upon persons.

It is an undeniable fact that a direct tax on the labor of persons (slave tax) is now being imposed under the guise of the income tax. To compell this upon the individual (by any means) would be a taking of property through coercion, totally immoral and illegal. To perpetuate this misconception and inflict it upon the people through intimidation is fraud, and creates a flaw in the system, vitiating the entire process of (income) tax collection by civil remidies, handing back to the citizen his Constitutional (Common Law) rights to due process and a jury trial.

Therefor, when I (Gardell) demanded proof of jurisdiction, it became the District Court's obligation to demand of the Plaintiff said proof.[5] They (United States) needed to provide evidence that in fact I was a taxpayer and subject to the civil law remedies

brought against me, (supra, §7602 which abrogates 4th amendment rights if unjustly applied). These demands were not met by the District Court of New Hampshire and judgment was entered against Gardell. In an appeal to the First Circuit the lower courts judgment was affirmed.

REASONS FOR GRANTING

In this case, Gardell's whole defense centers around the fact that the term income has been perniciously changed and the government (IRS) now acts illegally to collect debts unsanctioned by Law. It is clear, that by taking the position that this issue is frivolous the First Circuit Court of Appeals has turned a blind eye to the

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5. Once jurisdiction is challenged, it must be proven. Hagens v. Lavine, 415 US 533, note 3.

No sanction can be imposed absent proof of jurisdiction. Standard v. Olsen, 74 S Ct. 768

"mere goodfaith" assertions of power and authority (jurisdiction) have been abolished. Owers v. City of Independence, 445 US.

truth. Since their reasoning is based upon decisions at the circuit level only it becomes necessary and imperative that the Supreme Court settle this important issue.

To hold this issue to be frivolous challenges logic and the basic concepts or principles of the free system. Many questions arise which must be answered in order to justify this blatant divergence from the philosophy of freedom since in reality a tax on wages is a slave tax, e.g.:

1. If a person must work to survive, and is compelled to pay a portion of the money (which was traded for that life's time), would this not in reality be involuntary servitude, and in violation of the first principle of freedom (FREEDOM IS FREE) and the 13th Amendment?

2. Would not the working person lose all protected Common Law rights to due process, (as in this case)? Amendments 4,5 and 7.[6]

3. Would not such a tax infringe upon the Freedom of Religion subjugating (through

fear) those who work, to what in reality is a governmental religious agenda; thus making all persons individually responsible for the repercussions of that agenda?

4. Being that this Court has held that labor is property, and a right, would such a tax not infringe upon these rights?[7]

5. Being that the ability to tax is the ability to destroy; would such a tax not subvert the intended relationship between man and government, reversing the premise that "Governments derive their Just Powers from the Consent of the Governed" and replacing it with the doctrine that government rules by jus divinum and man exists only to serve it?

Although from Gardell's point of view

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6. "Where rights secured by the Constitution are involved,there can be no rule making or legislation which would abrogate them." Miranda v. Arizona, 384 U.S. 436, P.491

7. 48 Am. Jur. 2d, §1 Labor and Labor Relations, §2. Constitutional protection of right to work. (cited cases).

which is, that the idea of taxing wages (slave tax) (as the Circuit Court has held in this case) could be consistent with individual freedom, is absurd; he realizes that this misrepresentation is so engrained in the public consciousness that to tamper with it becomes almost sacrilegious; but can one be held to a fiction of Law because it is well accepted?

The only possibility for resolution and redress of these most important Questions is The Supreme Court.

CONCLUSIONS

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupuously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites anarchy."[8]

The above quote has become a reality. For what ever reason, the government has

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8. Justice Brandeis, Olmstead v. U.S., 277 U.S. 438. p. 485

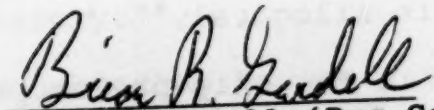
not scrupuously adhered to the Law, as described in the foregoing text. This has created a situation of great frustration among the people, both on a conscious and unconscious level. To promulgate the idea that a people are Free, and than to intimidate them into paying a tax which is not sanctioned by law (voluntarilly), is probably one of the psychologically cruelest actions ever perpetrated by a government. It may be true that the life blood of government is monies collected from taxation, but to tap directly into the veins of the people as that source is illogical and immoral. This scenario is an absurd digression from the more advanced philosophy (Law) of Freedom, back to the failed systems of socialistic government dominated civil law. It will not survive because it is illogical.

Freedom is the only philosophic reality left for humanity, and the only hope of bringing this multi-national-racial people together. Gardell has pondered this most

of his adult life and has taken the challenge to live as a Freeman, accepting the responsibility for his own life and dissolving any contractual agreements which would waive Common law rights and bind him to the civil law. He never waived any of his Constitutional rights at any time and always demanded proof that he was in fact subject to the Kings statutes being used against him; since these demands were not met this action should be dismissed.

Gardell now prays that the Court examine this most important issue through the instant case and asks this Petition for Writ of Certiorari be granted.

Respectfully submitted this 24 day of June, 1994, by;



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APPENDIX

A. Opinion and Judgment of the United States Court of Appeals for the First Circuit.....A,1-7

B. Opinion, Order and Judgment of the United States District Court of New Hampshire.....B,1-14

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 93-1916

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

v.

BRIAN R. GARDELL
Defendant, Appellant.

Appeal From The United States District Court for the District of New Hampshire

[Hon. Martin F. Loughlin, Senior U.S Judge]

Before
Torruella, Bourdin and Stahl,
Circuit Judges.

Brian R. Gardell on brief pro se.
Michael L. Paup, Acting Assistant Attorney General, Gary R. Allen et. al. Tax Division

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May 6,1994

Per Curiam. Appellant Brian Gardell appeals an order of the Unite States District Court for the District of New Hampshire approving the report and recommendation of the magistrate judge that he comply with and Internal Revenue Service (IRS) summons issued pursuant to 26 U.S.C. § 7602. The administrative summons directs Gardell to appear at the IRS office in Portsmouth, New Hampshire,. to give testimony and to produce for examination books and records relating to his tax liabilities for the years 1986 and 1987. Tax liabilities had previously been assessed against Gardell for these years and the purpose of the summons was to determine the collectability of these liabilities. On appeal, Gardell asserts that the district court lacked jurisdiction to enforce the summons since Gardell has the "Status... of Freeman and .. has no Contractual, Quasi-Contractual or implied agreements with the Federal Government." He also contends that the enforcement of the summons violated his

constitutional right to due process. We affirm essentially on the grounds stated by the magistrate judge in his report and recommendation dated July 7, 1993. We add only the following remarks.

First, Gardell's contention that as a "Freeman" without contractual obligations to the government he is not subject to the district court's jurisdiction is totally without merit.[1] See United States v. Sloan, 939 F.2d 499, 500-01 (7th Cir. 1991) (contention that appellant was free from income tax because he was a "freeborn, natural individual... (and thus) not subject to the jurisdiction of the laws of the United States" is frivolous), cert. denied, 112 S.Ct. 940 (1992); United States

1. Similarly frivolous is Gardell's contention that the taxing of wages is unconstitutional. See, e.g., Wilcox v.Commissioner, 848 F.2d 1007, 1008 (9th Cir. 1988) (contention that wages are not income for tax purposes is frivolous); Casper v. Commissioner, 805 F.2d 902,906 (10th Cir.1986)(appellant's contention that amount he received from his employer is not taxable income is "clearly without merit") (citing cases).

v.Drefke, 707 F.2d 978, 981 (8th Cir. 1983) (claim that "taxes are debts which can only be incurred voluntarily when individuals contract with the government for services... is totally without arguable merit"), cert. denied, 464 U.S. 942 (1983). The district court has subject matter over a petition to enforce a IRS administrative summons pursuant to 26 U.S.C. § 7604(a). It acquired personal jurisdiction over Gardell through service upon him of the show cause order and the petition of enforcement. United States v. Bichara, 862 F.2d 1037, 1039 (11th Cir. 1987); United States v. Miller, 609 F.2d 336,338 (8th Cir. 1979).

Second, the record makes clear that the IRS has met its burden of establishing a prima facie case for enforcement of the administrative summons as set out in United States v. Powell, 379 U.S. 48 (1964). See also Sylvestre v. United States, 978 F.2d 25, 26 (1st Cir. 1992),cert. denied, 113 S.Ct. 1606 (1993). Gardell, who concedes that

the IRS satisfied these requirements, thereupon bears the burden of showing, by an allegation of specific facts, that the enforcement of the summons would constitute an abuse of the court's process--" that is, that the summons had been issued for an improper purpose of for any other purpose reflecting on the good faith of the investigation." Id. at 27 (citing Powell, 379 U.S. at 58). The only arguments Gardell raised in this regard either before this court or before district court challenge the liabilities which were assessed against him and which underlie the summons. However, a challenge to an assessment of liability can only be brought in Tax Court within ninety days of the mailing of a notice of deficiency, see 26 U.S.C. §6213(a), or before the district court after the payment of the tax, id. §7422 (until tax is paid, district court without jurisdiction to hear allegation that tax has been erroneously assessed).[2] A challenge to the underlying assessment is

not a valid defense to the enforcement of an administrative summons, United States v. Harper, 662 F.2d 335, 336 (5th Cir. 1981) (per curiam) (taxpayer challenge to underlying assessment does not suffice to meet his burden to show improper purpose), and is misplaced in an appeal from a district court order enforcing one, United States v. Mueller, 930 F.2d 10, 12 (8th Cir. 1991) ("district court correctly held that (the summoned party) could not use the proceedings to enforce the IRS summons as a forum in which to contest the validity of the underlying assessments.").

Since Gardell was afforded an opportunity to challenge the administrative summons in an adversarial proceeding before the district court prior to the enforcement of the summons, he suffered no deprivation of his

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2. There is no evidence that Gardell ever attempted to file a petition for redetermination of his liabilities with the Tax Court. According to this IRS, the time to challenge Gardell's tax liability in Tax Court has now passed.

constitutional right to due process. See Reisman v. Coplin, 375 U.S. 440, 446, 449-50 (1964) (no constitutional invalidity in procedure for enforcement of summons since there is "full opportunity for judicial review before any coercive sanctions may be imposed"); United States v. Gilleran, 992 F.2d 232, 233-34 (9th Cir. 1993) ("no liberty or property interest protectable by due process prior to the enforcement of the summons").

Finally, the IRS asks this court to impose sanctions against appellant for bringing a frivolous appeal. Gardell's challenges to the administrative summons are frivolous and/or misplaced. Both this court and others have not hesitated to impose sanctions for similarly frivolous appeals. See,e.g., Kellly v. United States, 789 F.2d 94, 98 (1st Cir. 1986)(imposing sanctions on appellant who claimed that because he was a "natural individual and unenfranchised freeman" who neither asked for nor

received privileges from government he owed no tax); Sullivan v. United States, 788 F.2d 813, 816 (1st Cir. 1986) (similar); see also Wilcox, 848 F.2d at 1008 (appellant contended wages are not income and payment is voluntary); Casper v. Comissioner, 805 F.2d at 906 (similar). We agree that sanctions are warranted in this case. Although the Government seeks $1500 in lieu of costs and attorneys' fees, we, in accord with our prior practice in similar cases, assess only double costs against Gardell for bringing a frivolous appeal. Fed. R. App. P. 38.

The judgment of the district court is affirmed. Double costs are assessed against appellant.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

United States of America

v. Misc. No.93-12-L

Brian R. Gardell

REPORT AND RECOMMENDATION

This is a petition to enforce Internal Revenue Service (IRS) summons brought pursuant to the provisions of 26 U.S.C. §§ 7402(b) and 7604(a) in which the government is seeking to have this court order Brian R. Gardell (Gardell) to produce books, records and documents and to testify as to matters demanded in the summons dated August 18, 1992. A hearing was held on April 6, 1993, with the government being represented by Jeffrey Cahill, Esq., and Gardell appearing pro se.

Background

I. IRS Position

The IRS claims that Gardell had income and was required to file income tax returns

for 1985 and 1987. The IRS requested Gardell to prepare and file federal income tax returns for those years. When Gardell failed to comply with the request, the IRS prepared federal income tax returns for those years from information and knowledge it had at hand, determined that federal income taxes were due and owing pursuant to 26 U.S.C. §§ 6020(b)(1) and (2), and sent a notice of deficiency for each year to Gardell's last know address in 1987 pursuant to 26 U.S.C. §6212. Gardell failed to challenge the deficiencies pursuant to 26 U.S.C. §6213. In July 1991, Gardell was assessed a tax for 1987 and in August 1991 was assessed a tax for 1985. Gardell failed to pay the taxes due, and the IRS commenced its collection efforts. On August 18, 1992, the IRS issued and administrative summons ordering Gardell to appear at the IRS Office in Portsmouth, New Hampshire, on September 18, 1992. Gardell appeared in response to the summons but refused to comply with the summons by

producing the books, records and other documents and refused to testify as to matters demanded in the summons.

II. Gardell Position

Gardell does not contest the constitutionality of federal income taxes to raise revenue. He acknowledges that he did not file income tax returns for 1985 and 1987 because he had no income and challenges the IRS's position on due process grounds. More specifically, he claims that 1) he never received the notices of deficiency because they were sent to his old address and the IRS, with little effort, might have ascertained his new address, and 2) he was not given an opportunity for a hearing to question the deficiencies because he is foreclosed from filing a petition for redetermination of deficiency in the Tax Court under 26 U.S.C. §6213(a) and he is unable to pay the tax and seek refund in the district court under 26 U.S.C. §7422.

Gardell challenges the IRS's position on

burden of proof grounds and asserts that the IRS has the burden of proving that he had taxable income for the years in question.

Gardell finally claims that the IRS agent at the time of the service of the summons requested that he fill out collection Information Statement for Individuals, Form 433A, in lieu of appearance. Gardell refused to fill out Form 433A and appeared as ordered by the summons. He claims to have been evicted from the meeting when he refused to answer "Personal Information," question 7, regarding the name, address and telephone number of his next of kin which he believed to be irrelevant. He challenges the IRS on relevancy grounds.

Discussion

I. Due Process Grounds

Gardell is correct in pointing out that he is entitled to both notice and hearing under the United States Constitution.

The Code provides for notice under 26 U.S.C. §6212(b)(1) by requiring the IRS to

send the notice of deficiency to the taxpayer's last known address by certified or registered mail and provides for hearing under 26 U.S.C. §6213 by requiring the taxpayer to either file a petition for redetermination of deficiency or under 26 U.S.C. §7422 by requiring the taxpayer to pay the deficiency and bring an action for refund in the district court.

A. Notice

Gardell claims that he did not receive the notices of deficiency sent to him at his last known address by the IRS.

Gardell poses:

> The petitioner has outlined the letter of the administrative law here byt what about fair play. It is true that (because of an oversight) they (IRS) were not made aware of my (respondent) new address, but my move was by no means clandestine. A few phone calls could have easily located me but 20 minutes away from my previous location. Considering the gravity of the action and the serious damage that could ensue "fair play" would dictate a bit more effort on their part to resolve the assessment matter before the suit.

Rebuttal to United States Opposition at 7.

The purpose of notice of deficiency is to

enable a taxpayer to challenge alleged deficiencies in the Tax Court within ninety days before payment is due. Sorrentino v. Ross, 425 F.2d 213 (5th Cir. 1970). The notice of deficiency must be sent before the IRS can assess and collect the tax. The actual receipt of the notice by the taxpayer is not necessary, for all that is required is that the notice be sent to the taxpayer by certified or registered mail to the taxpayer's last known address under 26 U.S.C. § 6212(b). United States v. Zolla, 724 F.2dn 808 (9th Cir.), cert. denied, 469 U.S. 830, rehearing denied 469 U.S. 1067 (1984).

The court in Tadros v. C.I.R., 763 F.2d 89, 91-92 (2d Cir. 1985), pointed out that:

> Since the 90-day period of §6213(a) is a jurisdictional requirement, Johnson v. Comissioner, 611 F.2d 1015, 1018 (5th Cir. 1980); Shipley v. Commissioner, 572 F.2d 212, 213 (9th Cir. 1977), failure to file within that time period requires dismissal of the petition. The 90-day period begins to run on the day the notice of deficiency is mailed. Wilson v. Comissioner, 564 F.2d 1317, 1319 (9th Cir. 1977), cert.denied sub. nom. Mercer v. Commissioner, 439 U.S. 832, 99 S.Ct. 110, 58 L.Ed. 2d 127 (1978). Actual

receipt of the notice is unnecessary; if it is mailed to the taxpayer's last known address it is adequate for the purposes of the statute. Wallin v. Commissioner, 744 F.2d 674,676 (9th Cir. 1984).

The "last known address" is "the address where the Commissioner reasonable believed the taxpayer wished to be reached." United States v. Ahrens, 530 F.2d 781, 785 (8th Cir.1976). It has been defined as the taxpayer's "last permanent address or legal residence known by the commissioner or the last known temporary address of a definite duration to which the taxpayer has directed the commissioner to send all communications." Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 374 (1974),aff'd mem., 538 F.2d 334 (9th Cir.1976).

Although the mailing of notice to the taxpayer's last known address may not always provide actual notice to the taxpayer, this allowance for constructive notice protects the IRS from the overwhelming administrative burden of ascertaining each taxpayer's exact address at any given time. Luhring v. Glotzbach, 304 F.2d 556,558-59 (4th Cir.1962); Alta Sierra, 62 T.C. at 374. To further this purpose, it becomes the responsibility of the taxpayer to communicate to the commissioner a "clear and concise notification" of any change in address. Wallin v. Commissioner, 744 F.2d 674, 676 (9th Cir.1984). This is not to say, however, that the IRS has failed to exercise reasonable care in determining an address, a notice sent to the wrong address will not satisfy the statutory requirement, and the 90-day period will not begin to run. See e.g.

Wallin, 744 F.2d at 677; Crum v. Commissioner, 635 F.2d 895, 899-901 (D.C. Cir.1980).

It is clear that the IRS has done all that was necessary under the law to provide Gardell with a notice of deficiency.

B. Hearing

The law provides that Gardell is entitled to a hearing on the issue of his taxes, either in the Tax Court or in the district court.

(1). Tax Court

It appears that Gardell has never attempted to file a petition for redetermination with the Tax Court. While he now faces an uphill fight on the issue of jurisdiction in the Tax Court, it might well be that his argument concerning IRS's failure to exercise reasonable care in determining his address may be successful in that court. The argument must be made in the Tax 'Court, not the District Court.

(2). District Court

As noted above, Gardell has failed to pay the tax as assessed. Until the tax is

paid, the District Court has no jurisdiction under 26 U.S.C. §7422 to hear the matter.

Gardell presently has the opportunity for a hearing in the District Court.

As noted above, Gardell has been given constructive notice of deficiency and has not sought a hearing in the Tax Court. He has had actual notice of the assessment when he received final Notice (Notice of Intent to Levy) dated June 3, 1992, Response to Petition, Exhibit A, and has not paid his taxes and sought a hearing in the District Court.

I find his constitutional due process rights have not been violated.

II. Burden of Proof Grounds

Gardell asserts that the IRS has the burden of proving that he has income tax due.

As pointed out by the Supreme court almost sixty years ago in Bull v. United States, 295 U.S. 247 (1934), an assessment by the IRS that certain taxes are due and

the IRS that certain taxes are due and owing to the government makes the taxpayer a and gives the assessment the force of a judgment.

> Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer.

Id. at 260.

The IRS has followed the proper statutory method for assessing taxes against Gardell. Presently the IRS is properly pursuing the statutory method of collecting those taxes.

III. Relevancy Grounds

Gardell admittedly refused to answer

certain questions posed to him on September 18, 1992,. when he appeared at the IRS Office in Portsmouth, New Hampshire, in response to the summons. He "refuse to answer certain few irrelevant and personal questions" concerning the name, address and telephone number of his next of kin. Apparently the proceeding was terminated by the IRS upon Gardell's refusal to answer the questions. The IRS then sought enforcement of the summons in the present case.

Professor Moore, in discussing execution on judgments under Fed. R. Civ. P. 69(a), pointed out that such enforcement is usually controlled by state law and that discovery may be had under the Federal Rules or the State Rules. "If the judgment creditor utilizes federal practice, it is entitled to resort to the full range of discovery devices provided for in the (Federal) Rules." 7 James Wm. et al., Moore's Federal Practice, ¶69.05 (2d ed. 1993).

Fed. R. Civ. P. 26(b)(1) provides in part that, "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." (Emphasis added.) Basically, relevancy for discovery purposes is broadly and liberally construed. Herbert v. Lando, 441 U.S. 153 (1979); Hickman v. Taylor, 329 U.S. 495 (1947). Information is relevant if it is reasonably calculated to lead to admissible evidence. Coughlin v. Lee, 946 F.2d 1152 (5th Cir.1991). The party objecting to discovery usually has the burden of showing with specificity why it is irrelevant. Schaap v. Executive Industries, Inc., 130 F.R.D. 384 (N.D. Ill 1990).

I now consider Gardell's objection to the questions on the basis of relevancy and the IRS's termination of the proceedings.

Gardell

> (r)efused to answer certain few irrelevant and personal questions on the 1st page of form 433-A Collection Information Statement for Individuals hence did ensue said eviction. Never

was any of the information listed in the summons demanded, so technically said charges are false.

Response to Petition at 3.

I find that Gardell must specifically object to each question asked and give the basis for each objection. He must raise the particular privilege against the disclosure of information requested or the specific showing that the requested information is not relevant to the collection of the income tax.

It is therefore recommended that:

1. Brian R. Gardell, the respondent, be ordered to comply with the IRS summons which is the subject of the petition filed by the United States of America. Compliance shall take place by producing the testimony and documents requested in the summons to Revenue Officer Sonia Cryan at the Internal Revenue Service Office, Collections Division, 195 Commerce Way, Portsmouth, New Hampshire, on August 11, 1993, at 10:00 a.m.;

2. any objections to this report and

recommendation must be filed within ten days of receipt of this notice. Failure to file within the specified time waives the right to appeal the district court's order. See United States v ValenciaCopete, 792 F.2d 4,6 (1st Cir.1986);

3. the Order requiring compliance must be personally served on the respondent; and

4. upon entering this Order, the court will issue judgment forthwith in accordance with that Order.

William H. Barry Jr.
U.S. Magistrate Judge

O R D E R

After due consideration of the objection filed, I herewith approve the Report and Recommendation of Magistrate Judge William H. Barry,Jr dated July 19,1993.

SO ORDERED

Martin F. Loughlin
Senior U.S. Dis. Judge

J U D G M E N T

In accordance with the Order by Senior Judge Martin F. Loughlin, dated July 29, 1993, approving the 'Report and Recommendation of Magistrate Barry, dated July 7, 1993, judgment is hereby entered.

J. Brenda Comire
Deputy Clerk